STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Rock Island Clean Line LLC	:	
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Petition for an Order granting Rock Island Clean Line LLC a Certificate of Public Convenience and Necessity pursuant to Section 8-406 of the Public Utilities Act as a Transmission Public Utility and to Construct, Operate and Maintain an Electric Transmission Line and Authorizing and Directing Rock Island Clean Line Pursuant to Section 8-503 of the Public Utilities Act to Construct an Electric Transmission Line	:	**Docket No. 12-0560**

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

JESSICA L. CARDONI
CHRISTINE F. ERICSON
MATTHEW L. HARVEY
JAMES V. OLIVERO
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
Email: jcardoni@icc.illinois.gov
cericson@icc.illinois.gov
mharvey@icc.illinois.gov
jolivero@icc.illinois.gov

Counsel for the Staff of the
Illinois Commerce Commission

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REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Staff witnesses of the Illinois Commerce Commission ("Staff"), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission's ("Commission" or "ICC") Rules of Practice (83 Ill. Adm. Code 200.800), and the direction of the Administrative Law Judge ("ALJ"), respectfully submitting this Reply Brief ("Staff RB") in the above-captioned proceeding.

I. Introduction

On October 10, 2012, Rock Island Clean Line LLC ("Rock Island," "RICL" or the "Company") filed a Verified Petition ("Petition") and testimony in support of a Certificate of Public Convenience and Necessity as a Transmission Public Utility and to Construct, Operate and Maintain an Electric Transmission Line and Authorizing and Directing Rock

Island Clean Line to Construct a Transmission Line under Sections 8-406 and 8-503 of the Illinois Public Utilities Act ("Act"). 220 ILCS 5/8-406; 220 ILCS 5/8-503. (Petition at 1.) Specifically, Rock Island petitioned the Commission for an order (1) granting Rock Island a certificate of public convenience and necessity ("CPCN") pursuant to Section 8-406 of the Illinois Public Utilities Act ("Act" or "PUA"), 220 ILCS 5/8-406, to operate as a transmission public utility in the state of Illinois (2) granting it a CPCN pursuant to Section 8-406 to construct, operate and maintain an electric transmission line, (3) authorizing and directing Rock Island, pursuant to Section 8-503, 220 ILCS 5/8-503, to construct the electric transmission line, and (4) granting Rock Island certain relief in connection with its operations as a public utility. (Id.)

As stated in Staff's Initial Brief ("Staff IB"), Rock Island seeks to construct, operate and maintain a transmission line ("Project" or "Rock Island Project") which will be a nominal +600 kilovolt ("kV"), high voltage, direct current ("HVDC") transmission line and associated facilities that it states will be capable of delivering 3,500 megawatts ("MW") of power from renewable energy projects located in northwestern Iowa and nearby areas in Nebraska, South Dakota and Minnesota (the "Resource Area") to load and population centers east of the Mississippi River. (Petition at 2.) According to the Company, the Rock Island Project will originate at a converter station in O'Brien County, Iowa, traverse Iowa, cross the Mississippi River near Princeton, Iowa, enter Illinois south of Cordova, Illinois, traverse Illinois for approximately 121 miles, and interconnect with the extra high voltage (765 kV) transmission system of the PJM Interconnection, LLC ("PJM") at the Collins substation in Grundy County. The HVDC transmission line will terminate at a converter station to be located in Channahon, Illinois, and a single

circuit 345 kV alternating current ("AC") line and a double circuit 345 kV AC line will be constructed from the converter station to the point of interconnection at the Collins substation. (Id. at 2-3.) As set forth in Staff's IB, a number of parties intervened.

An evidentiary hearing was held on December 5, 6, 11, 12 and 13th, 2013. Witnesses testified and evidence was admitted into the record. On December 13, 2013, the ALJ entered a briefing schedule. Staff filed its Initial Brief on January 31, 2014. Other parties also filed initial briefs ("IB"). Those parties filing IB's include Commonwealth Edison Company ("ComEd"; Illinois Landowners Alliance; Environmental Intervenors (jointly "ELPC/NRDC"); Rock Island Clean Line LLC ("Rock Island", "RICL", or the "Company"); Local Unions 51, 9, 145, 196, International Brotherhood of Electric Workers, AFL-CIO ("IBEW"); Wind on the Wires ("WOW"); and the Illinois Agricultural Association ("IAA" or the "Farm Bureau"). This Reply Brief follows.

II. Review of ALJ Rulings on Motions

A. ILA and IAA Motions to Dismiss (Ruling dated March 18, 2013)

B. ILA Renewed Motion to Compel the Commission to Consult with the Illinois Department of Natural Resources (Ruling Dated December 4, 2013)

The ILA continues to argue that the Commission is required to consult with the Illinois Department of Natural Resources ("IDNR") prior to issuing a CPCN to Rock Island pursuant to the Illinois Natural Areas Preservation Act ("INAPA") and the Illinois Endangered Species Act ("IESA"). 525 ILCS 30/17; 520 ILCS 10/11. (ILA IB, 8.) As stated in Staff's several Responses to this issue, as well as in its IB, the Commission is not required to consult with IDNR or any outside Agency under Sections 8-406 or 8-503.

(Staff IB, 4; 220 ILCS 5/8-406, 5/8-503.) Staff believes that the Administrative Law Judge ("ALJ") has correctly ruled in Staff's favor twice on this issue and should not rule differently in the Proposed Order.

In the event that the Commission may seek to examine this question on the merits, Staff points out that it did review the evidence in the record, which addressed the Company's consultation with IDNR as well as several other environmental groups and non-governmental organizations. (Staff IB, 5.) Furthermore, as explained extensively in Staff's IB, the ILA's interpretation of the INAPA and IESA is incorrect, as the Commission is not "authorizing, funding, or carrying out" the RICL Project, according to Illinois case law on the topic. (Id. at 6 *citing* McHenry County Defenders, Inc. v. City of Harvard, 384 Ill.App.3d 265 (2nd Dist. 2008) and Pierce Downer's Heritage Alliance v. Village of Downers Grove, 302 Ill.App.3d 286, 297 (2nd Dist. 1998)). Staff also demonstrated that ILA's motion was an improper procedural vehicle from the beginning as enforcement of the INAPA is specified in the statute as a writ of mandamus to compel (rather than a Motion to Compel as ILA filed), which is an extraordinary remedy requiring equitable powers. The Commission does not possess such equitable powers. *See* Final Order at 4, River Bend Industrial Center, LLC v. MidAmerican Energy Company, Docket No. 02-0735 (May 21, 2003).

By way of background, on December 4, 2013, the ALJ issued an Order ("December 4th Ruling") denying ILA's Renewed Motion. The ALJ agreed with Staff and ruled that ILA's Motion to Compel was procedurally improper because the structured consultation process policy under the Act is enforceable only by writ of mandamus. (ALJ Ruling, December 4, 2013, 2.) The ALJ correctly ruled that the Commission should not

have to consult with IDNR. Accordingly, there is no basis whatsoever for the ALJ or Commission to reconsider the ILA's argument here for purposes of the Proposed Order, having already rejected ILA's argument twice. (Staff IB, 8.)

ILA requests that the Commission:

> (a) decide that the ILA need not file for a writ of mandamus in order to have the Commission in the first instance determine whether it has a duty to consult with the IDNR; (b) review and reverse the decision of the ALJ issued December 4, 2013; (c) find that (i) the Commission has a statutory duty to consult with the IDNR, (ii) it failed to comply with that duty, and (iii) such failure to consult was material; and (d) either dismiss the Rock Island Petition or enter an order directing the ALJ to conduct further proceedings consistent with the Commission's decision and directive. (ILA IB, 13-14.)

Staff recommends that the Commission affirm the ALJ's denial of ILA's Motion to Compel. Should the Commission choose to make a decision on the merits, as opposed to on the procedural defects of the ILA's Motion, Staff has provided ample reasoning as to why consultation is not required by law. (*See generally*, Staff Responses July 26, 2013, October 10, 2013, and October 29, 2013; Staff IB, 4-8.)

ComEd states that they have no opinion on the Motion, but that the Commission's burden to consult is "minimal." (ComEd IB, 14.) Staff does not agree that the process is minimal, and it is unclear why ComEd comes to this conclusion. As Staff pointed out in its second Response to ILA, it is unclear what role Staff would have in such consultation, and how Staff or the Commission would participate. (Staff Response, October 15, 2013, 10.) Nevertheless, the applicable regulations would impose a burden on the agency to undertake a lengthy two phase process. (Staff Response to ILA, October 29, 2013, 9-10.) First, it must provide an Agency Action Report with specificity about a proposed project. This would be difficult to undertake while Staff is still in the process of conducting its own regulatory assessment. The

agency must then wait 30 days for a determination from IDNR as to "whether a valid record of occurrence for a listed species or a Natural Area exists within the vicinity of the proposed action." 17 Ill. Adm. Code 1075-40(b). Then, if a listed species or a Natural Area is identified within the vicinity of the project, the agency must complete an additional "Detailed Action Report." (Id.) Under the regulations, the agency would be required to "provide background information on the listed species or Natural Area present" and to analyze the "direct and indirect effects of the proposed action on the listed species and its essential habitat or on the Natural Area including cumulative effects." 17 Ill. Adm. Code 1075-40(d). These matters require expertise that is beyond the scope of Commission authority. Then, assuming that it could obtain IDNR assistance with such expertise, once that analysis is completed, the Commission would be forced to await a "biological opinion" from the IDNR which would take an additional 60 days. (Id.)

Staff already routinely recognizes the protection of nature preserves, buffer areas and registered areas in its regulatory process in order to avoid recommending any action that would adversely affect them. (Staff October 15 Response, ¶19; Staff January 23, 2013 Response to ILA Amended Motion, ¶ 4.) In particular, Staff routinely inquires of the utility applicant during discovery whether the utility has completed the Endangered Species Consultation Process with the IDNR as well as required under Chapter 17 of the Illinois Administrative Code 1075, 520 ILCS 10/11 – IESA and 525 ILCS 30/17 – INAPA. The IDNR has an opportunity to be heard in this process; it may participate in any Commission proceeding as a party or may submit comments or reports at any time. Staff believes that this would be more appropriate and consistent

with the Commission's long-standing administrative process.

III. Public Utilities Act §8-406(a) – Request for Certificate as a Public Utility

In its IB, Rock Island claims that its business and operations will make it a public utility. (Rock Island IB, 28.) However, as Staff pointed out in its IB, Rock Island has not substantiated that assertion with facts in the evidentiary record. (Staff IB, 9-16.) Rock Island claims, for example, that it would be the first merchant transmission project in Illinois (Rock Island IB, 25), a fact which, even if true, does not make Rock Island a public utility. Rock Island also points to some prior cases that it claims are representative of why it should be granted a CPCN. Rock Island notes that in Docket 01-0142, for example, the Commission granted CPCNs to American Transmission Company L.L.C. ("ATC"), a transmission public utility formed to take ownership of and operate the transmission facilities of Wisconsin electric utilities, some of which were located in Illinois, and to ATC's affiliate ATC Management, Inc. In that case, the Commission found that the petitioners "own, control, operate, and manage, within this State, for public use, facilities used in the transmission of electricity." (American Transmission Company L.L.C. and ATC Management Inc., Docket No. 01-0142, Order, January 23, 2003 ("ATC Order"), at 5.)

The Commission noted in that case that the Petitioners' transmission lines are transmitting power within Illinois to serve Illinois customers and it is therefore in the public interest that the Commission oversee certain aspects of ATC operations. Id. Rock Island argues that like ATC, and other transmission public utilities, Rock Island will be owning, operating and managing transmission facilities in Illinois to transmit electricity for use by the public at rates, terms and conditions regulated by the FERC.

(Rock Island IB, 26.)

Staff agrees that there are transmission-only companies in Illinois that the Commission has deemed to be public utilities.[1] Those companies, however, are clearly distinguishable from the transmission operations that Rock Island plans. In each of those instances, the transmission service of those projects is made available to all customers on the same terms and conditions, clearly not confined in any respect to privileged or pre-determined contract customers as Rock Island seeks to do. Rock Island states it will use an "anchor tenant model to sell up to 75% of the transmission capacity on the Rock Island Project, with capacity not secured by anchor tenants being sold to customers through an 'open season' process or processes." (Petition at 11.) This means that 75% of Rock Island's capacity will be held for pre-subscribed private use to be sold to particular buyers and sellers at rates not established by FERC as is the case for transmission-only utilities to which the Commission has previously granted CPCNs. (Petition at 2.) Only 25% of the line's capacity will be subject to an "open auction" "for public use."

What is essential about being a public utility in Illinois is that the entity provide its services, whatever they might be, "for public use." 220 ILCS 5/3-105. This means that "all persons must have an equal right to use the utility, and it must be in common, upon the same terms, however few the number who avail themselves of it." (Palmyra Tel. Co. v. Modesto Tel. Co., 336 Ill. 158 (1929).) As pointed out in the Staff IB, even if and when the Project becomes subject to a FERC open access transmission tariff requiring the provision of non-discriminatory open access, the Project's limited capacity will still

[1] See American Transmission Company LLC and ATC Management Inc., Docket No. 01-0142, Final Order (January 23, 2003); Interstate Power and Light Company and ITC Midwest LLC, Docket No. 07-0246, Final Order **(**November 28, 2007).

prevent Rock Island from providing access to all eligible customers. (Staff IB, 15.) Rock Island admits in its IB that any eligible customer will be able to request service "subject to the overall capacity of the Project." (Rock Island IB, 27.) What Rock Island is asking the Commission to do is grant it a CPCN so it looks like a "public utility" for purposes of condemning private property to build its line, while at the same time it plans to offer only a token percentage of that line's capacity for "public use." The transmission service that Rock Island plans to provide on its transmission line does not meet the public use standard under Section 3-105 of the PUA.

IV. Public Utilities Act §8-406(b) – Request for Certificate for the Rock Island Project

A. Statutory Prerequisites for Public Convenience and Necessity

1. Necessary to provide adequate, reliable, efficient service or will promote development of an effectively competitive electricity market

2. Capable of efficiently managing and supervising the construction process

Rock Island asserts that it is capable of efficiently managing and supervising the construction process for the Rock Island Project. (Rock Island IB, 94.) Rock Island states that the reason that there are unfilled construction management positions is that at the current stage of the Project, there is not meaningful work for those positions. (Id. at 100.) Staff responds that this issue is not just about numbers or positions being filled, but rather, it is about whether the applicant can effectively and efficiently manage and supervise the construction of this $2.0 billion proposed project. Mr. Rashid also has concerns that RICL has never built a transmission line project of any kind or size. Staff believes that a startup company like RICL, would not be able to effectively and

efficiently manage and supervise the construction of this $2.0 billion project. Furthermore, RICL has yet to hire about 20 highly experienced qualified employees and the Commission has no way to know whether RICL will find those essential employees, and the existing employees experience does not appear to be pertinent to transmission line construction management and supervision as required by Section 8-406(b)(2) of the Act. (Staff IB, 60-61.) Mr. Rashid made these points in his Direct and Rebuttal Testimony, and RICL did not sufficiently address his concerns in testimony. Although RICL points out that many construction management positions are unfilled because there is not sufficient meaningful work at this stage of the Project (Rock Island IB, 100), RICL has not demonstrated that it could identify and successfully engage employees that possess the requisite experience needed to manage this Project.

It is not clear that RICL will even be able to adequately manage, supervise and conduct the development phase. Rock Island asserts that it has "engaged experienced contractors for the development phase of the project" (Rock Island IB, 95), yet it acknowledges that while it has plans to do so, it has yet to retain two engineering, procurement and construction contractors for key elements of the Project. (Id.) RICL has noted that other contractors are retained to address some aspects of the Project. This does not address Mr. Rashid's overarching concerns that no qualified highly experienced management team or even a remotely adequate management team seems to be in charge or even in place for the proposed $2 billion Project. (Staff IB, 60-62; Staff Ex. 1.0, 15.)

RICL may point to the Commission's August 20, 2013 Order in Ameren Transmission Company of Illinois: Petition for a Certificate of Public Convenience and

Necessity, pursuant to Section 8-406.1 of the Illinois Public Utilities Act, and an Order pursuant to Section 8-503 of the Public Utilities Act, to Construct, Operate and Maintain a New High Voltage Electric Service Line and Related Facilities in the Counties of Adams, Brown, Cass, Champaign, Christian, Clark, Coles, Edgar, Fulton, Macon, Montgomery, Morgan, Moultrie, Pike, Sangamon, Schuyler, Scott and Shelby, Illinois, ICC Docket No. 12-0598 (ATXI Order), as supporting the proposition that a small number of employees are sufficient to manage and supervise construction. ATXI Order at 129-131. However, the two cases are not apposite. In its ATXI Order, the evidence was clear that ATXI had, notwithstanding the fact that it had only one employee, successfully managed and supervised construction of other transmission line projects. ATXI Order at 129-130. The Commission found that this was sufficient to support a finding that ATXI had adequate managerial ability to manage and supervise construction of other transmission line there at issue. (Id. at 131.) That is not the case here where RICL has no such experience. As such, Staff continues to believe that the Company has not met the requirements of Section 8-406(b)(2) of the Act.

3. Capable of financing the proposed construction

Staff continues to recommend that RICL raise sufficient funding to complete the Project before it permanently installs transmission towers on landowner property. RICL agreed to Staff witness Pregozen's recommended condition as described in detail in testimony. Specifically, the condition requires RICL "will not install transmission facilities for Rock Island Clean Line Project on easement property until such time as Rock Island has obtained commitments for funds in a total amount equal to or greater than the total project cost." (Staff IB, 62-63; Rock Island IB, 117.) IBEW, ELPC and

NRDC urge the Commission to adopt the proposed financing condition and find that RICL is capable of financing the proposed construction under Section 8-406(b) of the Act. (IBEW IB, 9; ELPC/NRDC IB, 13-15.)

ComEd, IAA and ILA argue that RICL has not shown it is capable of financing the proposed construction. (ComEd IB, 33; IAA IB, 15; ILA IB, 30.) ILA argues that Rock Island has not shown that it can raise the capital necessary to fund the project, which depends on Rock Island lining up sufficient generators as costumers that do not yet exist (i.e., generators that have not been built). (ILA IB, 31-34). However, the Staff/RICL agreed-to condition requiring Rock Island to raise all the capital needed to construct the line addresses this issue because it prevents Rock Island from beginning construction on a project that it cannot complete.

ComEd argues that RI's and Clean Line's assets and commitments together amount to less than 2% of the total estimated costs to build the project, which does not meet the statutory requirement and is less than was the case in Northern Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n & Rockwell Utils. (ComEd IB, 34 citing Northern Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n & Rockwell Utils. 392 Ill. App. 3d 542, 568-69 (2nd Dist. 2009).) ComEd also states that the "unprecedented condition" does not demonstrate that the Company "has any present capability to finance the Project, as the law requires." (ComEd IB, 34.) Regardless, ComEd argues, RI has not provided evidence that it could obtain financing in the future as it is a "shell company, a developer with no material current financial ability." (Id. at 35.)

ComEd misreads Northern Moraine Wastewater. In Northern Moraine

Wastewater, the Northern Moraine Wastewater Reclamation District ("District") appealed, on several bases, the Commission's granting of a Section 8-406 CPCN to Rockwell Utilities, LLC ("Rockwell"). One of the bases for the District's appeal was that the Commission's conclusion that Rockwell satisfied Section 8-406(b) of the PUA was unsupported by the evidence. Northern Moraine Wastewater, 392 Ill. App. 3d at 566, et seq. The District argued that Rockwell's financing was insufficient because it was based on a sole financial provider's promise to loan Rockwell money when needed. (Id. at 568-69.) The Appellate Court found that the record supported the Commission's finding that Rockwell was financially capable of serving the subject area. (Id.) In so doing, it observed that Staff would have an opportunity to review information on a prospective basis to assess whether rates should be reassessed to ensure there would not be a negative impact on its ability to serve the subject area. (Id. at 569.) The information the ICC Staff would review on a prospective basis included Rockwell's plant investments, revenues, and expenses. (Id.)

Northern Moraine Wastewater stands for the proposition that an applicant's showing under Section 8-406(b)(3) need not be based entirely on assets on hand, held by the applicant itself, but may consist of the backing of a parent company, affiliate or (if an LLC) a member, which assets have been pledged, committed or promised. Furthermore, the Northern Moraine Wastewater court considered ongoing oversight by Commission Staff of the company's financial health to be a significant safeguard against financial problems arising.

Here, the safeguards of the agreed-to condition similarly ensure that RICL must demonstrate financial viability prior to installation of transmission lines on landowner

property. Additionally, the Commission has previously granted a Section 8-406 Certificate to an entity that had no existing assets or revenues, and no existing financial ratios. (Illinois Power Company and Ameren Illinois Transmission Company, Order Docket No. 06-0179, May 17, 2007, 19.)

Finally, Section 8-406(b)(3) requires the utility show that it "is capable of financing the proposed construction *without significant adverse financial consequences for the utility or its customers.*" 220 ILCS 5/8-406(b)(3) (emphasis added). The harm to Rock Island, if it were a utility, is limited, as it owns no other facilities in the State of Illinois, and the agreed-to condition ensures Rock Island does not begin construction without the $1.8 billion required to carry out the Project. RICL's customers for the Proposed Project would be: (1) wind energy producers in the Resource Area; and (2) buyers of electricity at the eastern end of the line, primarily wholesale market participants. (Rock Island IB, 6, fn 8.) Therefore, RICL's customers are not traditional ratepayers. This Commission has stated that it is more concerned about impacts on customers who are ratepayers. (Illinois Power Company and Ameren Illinois Transmission Company, Docket No. 06-0179, May 17, 2007, 28.) ("Further, even assuming [Ameren Illinois Transmission Company] were adversely affected, there does not appear to be any likelihood that those adverse consequences for its "customers" would involve actual harm to ratepayers. That is, the Commission is more concerned about impacts on "customers" who are ratepayers than those who are not.")

In short, given that RICL admits that it must satisfy a number of conditions before it could raise sufficient capital to fund the entire project (Rock Island IB, 107), ILA, IAA and ComEd's concerns about RICL's financial capability are understandable.

Nonetheless, Staff believes that Section 8-406(b)(3) is met if the Commission adopts the Staff/RICL agreed-to condition. If RICL does not raise all the capital needed to construct the entire project, construction will not begin and RICL and its "customers" will not suffer significant adverse financial consequences. If RICL does raise all the capital needed to construct the entire project, then it follows that RICL could construct the entire project without significant adverse financial consequences to either RICL or its customers.

4. Other factors bearing on public convenience and necessity

B. Route of the Project / Land Acquisition

1. Proposed Route

2. Proposed Easement Widths

3. Easement Acquisition and Landowner Compensation

C. Design and Construction of the Project

1. Proposed Structures and Other Components

2. Landowner Concerns about Impacts of Construction of the Project [Note: This section is intended to include impacts on aerial applications on agricultural properties]

D. Other Proposed "Conditions" [e.g., cost recovery through generally allocated transmission rates]

V. Public Utilities Act §8-503 – Order Authorizing and Directing Construction

In its Petition initiating this proceeding, RICL applied for an Order "authorizing *and* directing" (emphasis added) RICL, pursuant to Section 8-503 of the PUA, to construct the electric transmission line. (Petition at 1.)

Section 8-503 of the PUA states, in pertinent part, as follows:

> Whenever the Commission, after a hearing, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any 2 or more public utilities are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected at the location, in the manner and within the time specified in said order; …
>
> 220 ILCS 8-503.

By the express terms of Section 8-509 of the PUA, an order under Section 8-503 is a prerequisite to being able to obtain an order under Section 8-509 authorizing the use of eminent domain to acquire property rights.[2]

Contrary to RICL's arguments that it has met the requirements of Section 8-503, RICL has failed to meet the requirements of Section 8-503, and therefore does not qualify for an Order from the Commission "authorizing and directing" RICL to construct the project under Section 8-503 of the PUA.

As set forth in Section 8-406(a) of the PUA and briefed by the parties, the issue of whether RICL is a public utility is a similar question under Section 8-503 of the PUA. As noted in its IB, Staff has concerns with any finding that RICL would be an Illinois "public utility," entitled to rights inherent in that status, including the right, when authorized following the proper application to the Commission, to be granted by the

[2] Section 8-509 states in pertinent part: "When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-406.1, 8-503, or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain. If a public utility seeks relief under this Section in the same proceeding in which it seeks a certificate of public convenience and necessity under Section 8-406.1 of this Act, the Commission shall enter its order under this Section either as part of the Section 8-406.1 order or at the same time it enters the Section 8-406.1 order. If a public utility seeks relief under this Section after the Commission enters its order in the Section 8-406.1 proceeding, the Commission shall issue its order under this Section within 45 days after the utility files its petition under this Section."

Commission the right to exercise the power of eminent domain. (Staff IB, 16.) While RICL states that it is not seeking authority pursuant to Section 8-509 of the PUA to acquire land and land rights through eminent domain, it is entirely possible that RICL could seek such authority going forward. (Id. at 15.) Indeed, while the Company said that it would not pursue that option unless it is unsuccessful in obtaining all land and rights-of-way needed after making reasonable efforts to acquire the land rights through negotiations and voluntary transactions, it did not rule out that option. (Rock Island Ex. 1.0, 5.) The Commission might well find it difficult to reconcile condemnation authority for a private merchant project built to serve particularly targeted out-of-state customers through private contracts. (Staff IB, 16.)

RICL claims the evidence that supports granting a CPCN to construct the project also supports a finding that the requirements for an order under Section 8-503 are met because the criterion of Section 8-503 "to promote the development of an effectively competitive electricity market" is the same as the Section 8-406(b)(1) criterion. Staff disagrees. (Rock Island IB, 164.) With respect to whether the proposed construction will promote the development of an effectively competitive electricity market, an effectively competitive electricity market already exists, but the RICL Project would not threaten the competitiveness of the electricity market. (Staff Ex. 3.0, 5.) Whether the RICL Project will promote or contribute to an effectively competitive electricity market that operates efficiently and is the least cost means of satisfying those objectives largely depends on whether the project's benefits outweigh the costs. (Id. at 6.) Staff believes that the evidence supports a finding that the Project would promote an effectively competitive electricity market, but that the preponderance of evidence in favor of such a

finding is not a strong preponderance and is subject to "considerable uncertainty." (Id.) Staff notes that there is no evidence suggesting that the Project would prevent an even greater degree of competition being attained through an alternative project or some combination of alternative projects.

Staff has opined that the evidentiary record shows that the Project does not satisfy the requirements of Sections 8-406(a)-(b). (Staff IB, 48, 59-62.) If there is no basis to issue a CPCN, there is less of a reason to take the extraordinary step of ordering the Project's construction under Section 8-503. Given all the contingencies, conditions, and government and regulatory approval still needed, RICL is petitioning the Commission for authority that cannot be utilized. The request for an order pursuant to Section 8-503 is premature and should therefore denied.

The request is premature for yet another reason. As the Commission noted in its Order in Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Company: Petition for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406 of the Illinois Public Utilities Act, to construct, operate and maintain new 138,000 volt electric lines in LaSalle County, Illinois, Docket No. 06-0706 (March 11, 2009) ("Illinois Power Order"):

> [G]ranting relief under Sections 8-406 and 8-503 does not render a later request under Section 8-509 a mere formality. While it is true that authority under Section 8-503 is specifically required before eminent domain authority can be granted under Section 8-509, a showing must also be made that the utility made a reasonable attempt to acquire the property before it will be allowed to exercise eminent domain authority in circuit court. The Commission is not prepared to say that even after a utility makes a reasonable attempt to acquire the property that it would automatically receive eminent domain authority under Section 8-509. Nor will the Commission assume that a circuit court would permit the exercise of eminent domain by a utility that has received authority under Section 8-509 from the Commission. Furthermore, to be clear, a certificate under

> Section 8-406 without authority under Section 8-503 is not sufficient for relief under Section 8-509. A utility may obtain a certificate under Section 8-406 in one docket. If it later desires eminent domain authority under Section 8-509, it may initiate a new docket in which it seeks relief under Sections 8-503 and 8-509.

Illinois Power Order at 88-89 (emphasis added).

In other words, in the Commission's view, receipt of authority under Sections 8-406 and 8-503 is a necessary, but not a sufficient, condition for and award of eminent domain authority under Section 8-509. A utility must also demonstrate that it has negotiated in good faith with landowners and has nonetheless failed to obtain all of the necessary parcels.

The Commission has reiterated its determination that utilities should negotiate prior to receiving eminent domain authority in several subsequent proceedings. See, e.g., Order at 14, Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Company: Petition for an Order pursuant to Section 8-509 of the Public Utilities Act Approving Petitioners' use of Eminent Domain Power, Docket No. 10-0173 (November 23, 2010); Order at 13-14, Central Illinois Public Service Company d/b/a AmerenCIPS: Petition for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406 of the Illinois Public Utilities Act, to construct, operate and maintain new 138,000 volt electric lines in Madison County, Illinois, Docket No. 07-0532 (May 6, 2009).

In keeping with prior Commission Orders, RICL should be required to demonstrate it has negotiated in good faith with adjacent landowners before eminent domain under Section 8-509 is granted.

VI. Rock Island's Accounting-Related Requests

A. System of Accounts

B. Maintaining Books and Records Outside of Illinois

C. Request for Proprietary Treatment of Certain Information

VII. Conclusion

For the reasons set forth in Staff's Initial Brief and this Reply Brief, Staff respectfully requests that the Commission's order in this proceeding reflect all of Staff's recommendations regarding the Company's Petition.

Respectfully submitted,

JESSICA L. CARDONI
CHRISTINE F. ERICSON
MATTHEW L. HARVEY
JAMES V. OLIVERO

Counsel for the Staff of the Illinois Commerce Commission

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JESSICA L. CARDONI
CHRISTINE F. ERICSON
MATTHEW L. HARVEY
JAMES V. OLIVERO
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
E-mail: jcardoni@icc.illinois.gov
cericson@icc.illinois.gov
mharvey@icc.illinois.gov
jolivero@icc.illinois.gov